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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

KARAMPAL SINGH NAKAI, } Case No. ED CV 11-1139-SP
Petitioner, }
v. }
PERSONAL PROBATION OFFICER, } MEMORANDUM OPINION AND
and MATTHEW CATE, Director, } ORDER
Respondents. }

I.

INTRODUCTION

Petitioner Karampal Singh Nakai filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 on July 20, 2011. This matter comes before the court on respondents' motion to dismiss the petition for failure to exhaust state remedies. All parties having consented to proceed before the assigned magistrate judge, and with briefing completed, the matter is ready for decision.

Because, at a minimum, the petition is mixed and may very well be fully unexhausted, the motion to dismiss will be granted. Further, because petitioner's one arguably exhausted claim is barred from relitigation in federal courts and petitioner has failed to show the good cause necessary for a stay pursuant to *Rhines v. Weber*,

1 544 U.S. 269, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005), the petition will be denied
 2 and the action dismissed without prejudice.

3 **II.**

4 **PROCEEDINGS**

5 On June 6, 2008, a Riverside County jury found petitioner guilty of two counts
 6 of attempting to send harmful matter to a minor with the intent to seduce the minor
 7 (Cal. Penal Code §§ 664, 288.2(a)). CT at 258-59. On August 29, 2008, the trial
 8 court sentenced petitioner to 270 days in the custody of the Riverside County Sheriff
 9 and thirty-six months of formal probation. CT at 282.

10 Petitioner filed a petition for direct review in the California Court of Appeal.
 11 Lodg. 3. On April 2, 2010, the California Court of Appeal affirmed petitioner's
 12 conviction. Lodg. 7.

13 Petitioner then filed a petition for review in the California Supreme Court on
 14 May 17, 2010, arguing: (1) because petitioner had a reasonable expectation of privacy
 15 in email conversations, the trial court's refusal to exclude petitioner's internet
 16 communications from evidence violated Cal. Penal Code § 632, which requires the
 17 exclusion of recordings of confidential communications made without the joint
 18 knowledge and consent of the participants; (2) the trial court erred in refusing to give
 19 a lesser-included offense jury instruction when it ignored substantial evidence that a
 20 reasonable jury could find petitioner guilty of the lesser-included offense; and (3)
 21 venue was not proper in Riverside County. Lodg. 8 at 4-15. On July 21, 2010, the
 22 California Supreme Court denied the petition without comment. Lodg. 9.

23 Petitioner filed the instant federal habeas petition on July 20, 2011. He raises
 24 the following grounds for relief: (1) the trial court's refusal to instruct the jury on a
 25 lesser-included offense violated petitioner's Sixth Amendment right to a jury trial; (2)
 26 the trial court's refusal to give the lesser-included offense instruction violated

1 petitioner's Fourteenth Amendment right to due process; (3) the arbitrary deprivation
 2 of petitioner's statutory right to have confidential communications violated
 3 petitioner's Fourteenth Amendment right to due process; (4) the trial court's
 4 admission of petitioner's confidential communications violated his Fourth
 5 Amendment right to be free of unreasonable seizures. Pet. at 5-6; Mem. in Supp. of
 6 Pet. at 4-21.

7 **III.**

8 **DISCUSSION**

9 **A. The Petition Must Be Dismissed Without Prejudice Because, at a**
 10 **Minimum, the Petition Is a Mixed Petition**

11 It is well established that, before a state prisoner may challenge his state
 12 conviction in federal court via a federal habeas petition, he must first exhaust his
 13 federal grounds for relief in state court. 28 U.S.C. § 2254(b); *see also Duncan v.*
 14 *Henry*, 513 U.S. 364, 365, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995) (per curiam). To
 15 satisfy the exhaustion requirement, a petitioner must "fairly present" his federal claims
 16 to the state courts, "to give the State the opportunity to pass upon and correct alleged
 17 violations of its prisoners' federal rights." *Duncan*, 513 U.S. at 365 (internal
 18 quotation marks and citation omitted). "To provide the State with the necessary
 19 'opportunity,' the prisoner must 'fairly present' his claim in each appropriate state
 20 court (including a state supreme court with powers of discretionary review), thereby
 21 alerting that court to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27,
 22 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004) (citations omitted).

23 To "fairly present" a federal claim to the state's highest court, the petitioner
 24 must alert that court to the claim in the brief or petition presented to that court.
 25 *Baldwin*, 541 U.S. at 31-32. A state prisoner does not "fairly present" a claim to a
 26 state court if that court must read beyond the petition or a brief to find material, such

1 as a lower court opinion in the case, that does so. *Id.* Further, the petitioner must
 2 describe both the federal legal theory and the operative facts to the state court so that
 3 court has a “fair opportunity” to apply controlling legal principles to the facts bearing
 4 upon his constitutional claim.” *Anderson v. Harless*, 459 U.S. 4, 6, 103 S. Ct. 276, 74
 5 L. Ed. 2d 3 (1982) (per curiam) (citation omitted). In describing the federal legal
 6 theory to the state court, a petitioner must identify the specific federal claim; general
 7 appeals to a constitutional guarantee as broad as due process are insufficient to fairly
 8 present the “substance” of a federal claim to a state court. *See Gray v. Netherland*,
 9 518 U.S. 152, 163, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996).

10 Here, having carefully reviewed the claims raised in the petition for review in
 11 the California Supreme Court and compared them to the claims asserted in the instant
 12 federal petition, it is apparent petitioner failed to raise any of his four asserted grounds
 13 for federal habeas relief in the California Supreme Court. *Compare* Pet. at 5-6; Mem.
 14 in Supp. of Pet. at 4-21 *with* Lodg. 8. Current Grounds One and Two – contending
 15 that the failure to give the lesser-included offense instruction violated the Sixth and
 16 Fourteenth Amendments – were simply not presented to the California Supreme
 17 Court. Although petitioner’s California Supreme Court petition did raise a lesser-
 18 included offense claim, it cited only California law and did not reference in any way
 19 the federal Sixth Amendment right to trial by jury or the federal Fourteenth
 20 Amendment right to due process of law. Likewise, although petitioner argued to the
 21 California Supreme Court that his confidential email communications should have
 22 been excluded, the federal legal theories underlying Grounds Three and Four in his
 23 instant federal petition – that his Fourteenth and Fourth Amendment rights have been
 24 violated – were not presented to the California Supreme Court.

25 Petitioner concedes that he did not invoke the Sixth or Fourteenth Amendments
 26 in his state court petition. Opp. at 2. But he argues that these federal issues should
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1 have been clear on the face of the petition to the state court because improper jury
 2 instructions generally violate the Sixth Amendment, and a trial court's failure to give
 3 lesser-included offense instructions or suppress evidence generally violates the
 4 Fourteenth Amendment. Opp. at 2-3. These arguments are unpersuasive. Petitioner
 5 cites *Tamapua v. Shimoda*, 796 F.2d 261, 263 (9th Cir. 1986), for the proposition that
 6 asserting a state law claim that is "essentially the same" as a federal constitutional
 7 claim is sufficient to satisfy the exhaustion requirement. Opp. at 3. But *Tamapua* was
 8 decided before the Supreme Court decided *Duncan*. As the Ninth Circuit
 9 subsequently recognized, "[a]fter *Duncan*, *Tamapua*'s 'essentially the same' standard
 10 is no longer viable." *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996). Here,
 11 petitioner simply did not fairly present his constitutional claims to the California
 12 Supreme Court.

13 The only current ground that might even arguably be exhausted is Ground Four,
 14 contending that the admission of private chat room conversations against petitioner
 15 violated the Fourth Amendment. Petitioner's petition for review to the California
 16 Supreme Court cited *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d
 17 576 (1967), in arguing that petitioner had a reasonable expectation of privacy in his
 18 internet chat room conversation. *See* Lodg. 8 at 5. In *Katz*, the United States Supreme
 19 Court held that the government's electronic surveillance constituted an unreasonable
 20 search and seizure in violation of the Fourth Amendment. *Katz*, 389 U.S. at 354-59.
 21 But although petitioner cited to *Katz* in his petition to the California Supreme Court,
 22 he certainly did not "fairly present" a Fourth Amendment claim to that court. Instead,
 23 the argument that he fairly presented was that the trial court failed to abide by
 24 California Penal Code § 632.

25 In any event, even if this one case citation were sufficient to give the state court
 26 adequate notice of an implied Fourth Amendment claim, the petition would still be
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1 subject to dismissal as a “mixed” petition improperly containing both exhausted and
 2 unexhausted claims. A mixed petition is subject to dismissal. *Rose v. Lundy*, 455
 3 U.S. 509, 522, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982).

4 Normally, the district court must give the petitioner the choice of returning to
 5 state court to exhaust his claims or of amending the habeas petition to present only
 6 exhausted claims to the district court before dismissing a mixed petition. *Jefferson v.*
 7 *Budge*, 419 F.3d 1013, 1015-17 (9th Cir. 2005). But because, as discussed below,
 8 petitioner’s sole arguably exhausted claim is barred from relitigation in federal court
 9 in any event, allowing him to amend to proceed on only this arguably exhausted claim
 10 would be fruitless.

11 **B. Petitioner’s Sole Arguably Exhausted Claim Is Barred Because Petitioner**
 12 **Received a Full and Fair Opportunity to Litigate His Fourth Amendment**
 13 **Claim**

14 A Fourth Amendment claim is not cognizable in federal habeas proceedings if a
 15 petitioner has had a full and fair opportunity to litigate the claim in state court. *Stone*
 16 *v. Powell*, 428 U.S. 465, 494, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976); *see also*
 17 *Woolery v. Arave*, 8 F.3d 1325, 1326 (9th Cir. 1993). “The relevant inquiry is whether
 18 petitioner had the opportunity to litigate his claim, not whether he did in fact do so or
 19 even whether the claim was correctly decided.” *Ortiz-Sandoval v. Gomez*, 81 F.3d
 20 891, 899 (9th Cir. 1996) (citations omitted).

21 Petitioner received an opportunity for full and fair litigation of his Fourth
 22 Amendment claim in the state courts, and fully availed himself of that opportunity.
 23 *See Gordon v. Duran*, 895 F.2d 610, 613-14 (9th Cir. 1990) (California Penal Code
 24 section 1538.5 provides a defendant with a “full and fair” opportunity to litigate a
 25 Fourth Amendment search and seizure claim in state court); *see also Abell v. Raines*,
 26 640 F.2d 1085, 1088 (9th Cir. 1981) (petitioner received full and fair opportunity to

1 litigate where issues were briefed and were considered by state courts). “All *Stone v.*
 2 *Powell* requires is the initial opportunity for a fair hearing.” *Caldwell v. Cupp*, 781
 3 F.2d 714, 715 (9th Cir. 1986) (citation omitted). “Such an opportunity for a fair
 4 hearing forecloses this court’s inquiry, upon habeas corpus petition, into the trial
 5 court’s subsequent course of action.” *Id.* (citations omitted). Because petitioner
 6 received the opportunity to brief and be heard on his Fourth Amendment claim, habeas
 7 relief is foreclosed. *Id.*

8 Petitioner recognizes that conflict among the circuits exists regarding how
 9 egregious the breakdown in the state procedure must be before the federal courts will
 10 entertain Fourth Amendment claims on habeas review. *See Pet.* at 19-20. Despite
 11 noting the Ninth Circuit standard barring claims if petitioner had the opportunity to
 12 raise his claim even if the state court reached the incorrect result (*Ortiz-Sandoval*, 81
 13 F.3d at 899), petitioner asks this court to apply the Tenth Circuit standard, which
 14 disregards the bar on relitigation if the state courts willfully refused to apply the
 15 correct standard. *Pet.* at 20 (citing *Gamble v. Oklahoma*, 583 F.2d 1161, 1165 (10th
 16 Cir. 1978)). As petitioner’s counsel must realize, however, this court sits in the Ninth
 17 Circuit and is bound by Ninth Circuit precedent. *Zuniga v. United Can Co.*, 812 F.2d
 18 443 (9th Cir. 1987) (“District courts are, of course, bound by the law of their own
 19 circuit, and are not to resolve splits between circuits no matter how egregiously in
 20 error they may feel their own circuit to be.”) (quotation and internal citation omitted).
 21 Therefore, this court is not at liberty to apply the Tenth Circuit standard.

22 In this circuit, our inquiry is whether petitioner had the opportunity to litigate
 23 his Fourth Amendment claim in the state courts, not whether the state courts erred in
 24 failing to suppress the evidence at issue. *Ortiz-Sandoval*, 81 F.3d at 899. Petitioner
 25 acknowledges he was given such an opportunity. *See Pet.* at 20. Petitioner objects to
 26 the trial court’s “bold and sweeping declaratory ruling” (*id.*) that “to believe . . . an

1 unknown person [on the internet will] hold in confidence the [email]
 2 communication . . . is entirely unrealistic and irrational to believe.” RT at 27. But any
 3 allegation that the state court’s factual findings were not supported by the evidence
 4 fails to demonstrate that petitioner lacked a full and fair opportunity to litigate his
 5 Fourth Amendment claims in state court. *See Moormann v. Schriro*, 426 F.3d 1044,
 6 1053 (9th Cir. 2005); *see also Mack v. Cupp*, 564 F.2d 898, 901-02 (9th Cir. 1977)
 7 (even where state court mistakenly recited and relied on facts that did not exist, *Stone*
 8 *v. Powell* barred relief). “Under *Stone* a federal district court may not relitigate a
 9 fourth amendment issue tried fully and fairly in a state court, regardless of its view of
 10 the correctness of the state decision.” *Mack*, 564 F.2d at 901; *accord Siripongs v.*
 11 *Calderon*, 35 F.3d 1308, 1321 (9th Cir. 1994) (“the correctness of the state court
 12 resolution [of a Fourth Amendment claim is] an issue which *Stone v. Powell* makes
 13 irrelevant”).

14 As discussed above, the court finds that petitioner did not exhaust any of his
 15 grounds for relief, including Ground Four. But even if the court had found Ground
 16 Four exhausted, because Ground Four is barred from reconsideration in federal court,
 17 petitioner could not be prejudiced by not being given the opportunity to proceed on
 18 only Ground Four.

19 **C. Petitioner Has Failed to Establish Good Cause for a Stay**

20 Petitioner asks the court to hold this action in abeyance pursuant to *Rhines*,
 21 should the court conclude that the petition is mixed. Opp. at 3-4. Petitioner has raised
 22 no arguments in support of his request, but simply notes the court has discretion to
 23 employ the stay procedure. *Id.* at 4.

24 A “stay and abeyance is only appropriate when the district court determines
 25 there was good cause for the petitioner’s failure to exhaust his claims first in state
 26 court.” *Rhines*, 544 U.S. at 277. Additionally, a stay is not warranted “when the

1 unexhausted claims are plainly meritless[,] or where the petitioner has engaged in
2 “abusive litigation tactics or intentional delay.” *Id.* at 277-78.

3 Here, petitioner has not made any attempt to demonstrate why he failed to
4 exhaust all of his claims before filing in this court. As such, petitioner has failed to
5 establish good cause warranting a stay under *Rhines*.

6 Accordingly, the petition should be dismissed without prejudice to petitioner
7 reasserting Grounds One through Three in a future habeas petition, after he has
8 exhausted his state court remedies and his state habeas proceedings have concluded.

9 **IV.**

10 **CONCLUSION**

11 IT IS THEREFORE ORDERED that respondents’ motion to dismiss is granted,
12 and Judgment shall be entered denying the Petition and dismissing this action without
13 prejudice.

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15 DATED: February 6, 2012



16
17 SHERI PYM
18 United States Magistrate Judge
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